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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

KEVIN LEE MAERTENS and PATRICIA MAERTENS, husband and wife, Plaintiffs/Appellants, v. CITY OF APACHE JUNCTION, a municipal corporation, Defendant/Appellee.	2 CA-CV 2009-0144 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CV20080546

Honorable William J. O'Neil, Judge

AFFIRMED

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K E L L Y, Judge.

¶1 Appellants Kevin and Patricia Maertens appeal from the trial court's entry of summary judgment in favor of the City of Apache Junction. They maintain the trial court erred in concluding the City had no duty to maintain a certain traffic-control sign and that disputes of material fact precluded summary judgment. Concluding summary judgment was appropriate, we affirm.

Background

¶2 We view the facts and all reasonable inferences therefrom in the light most favorable to the party opposing summary judgment. *Chalpin v. Snyder*, 220 Ariz. 413, ¶ 17, 207 P.3d 666, 671 (App. 2008). In February 2007, Ana Ballesteros turned left from a parking lot driveway onto Ironwood Drive in Apache Junction. She collided with Kevin Maertens, who had been traveling on Ironwood Drive on his motorcycle. Maertens sustained serious injuries as a result of the accident and he and his wife brought this action against the City of Apache Junction and Basha's, Inc.[1]

¶3 In their complaint, the Maertenses alleged the City had negligently failed to maintain a right-turn-only sign where the shopping center's driveway met Ironwood Drive. The Maertenses alleged that sometime prior to the accident, the sign had been on a post in a short concrete wall located at the end of the driveway.[2] Before the accident

[1]Basha's, owner of the parking lot, moved for summary judgment, and the trial court granted its motion and dismissed the case against it. The Maertenses do not appeal that decision here.

[2]According to the Maertenses' expert witness, the signpost was located in the City's right-of-way. The City's engineer averred the signpost in the short wall was located on private property, and the City conceded for purposes of summary judgment that a question of fact existed as to whether the sign was in the City's right-of-way.

occurred, the sign had been knocked down and not repaired. The Maertenses maintained the lack of a sign at the location created an unreasonably dangerous condition of which the City had notice and the City's failure to cure the condition resulted in his injuries.

¶4 The City moved for summary judgment, arguing it had no duty to maintain the sign and in any event it had not received "notice of any allegedly defective condition." The trial court granted the motion, ruling, inter alia, that the City had no duty to maintain the sign and had received no notice the sign had been removed. It therefore entered judgment in favor of the City, and this appeal followed.

Discussion

¶5 The Maertenses argue the trial court abused its discretion in granting summary judgment in favor of the City. They maintain the City had a "duty to install and maintain" a right-turn-only sign at the driveway where Ballesteros left the parking lot. And they maintain questions of fact remained as to whether the City breached its purported duty. We review the trial court's grant of summary judgment de novo. *Chalpin*, 220 Ariz. 413, ¶ 17, 207 P.3d at 671. "'Summary judgment is appropriate only if no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law.'" *Id., quoting Wells Fargo Bank v. Ariz. Laborers, Teamsters & Cement Masons*, 201 Ariz. 474, ¶ 14, 38 P.3d 12, 20 (2002). "We will affirm if the trial court's ruling is correct on any ground." *MacLean v. State Dep't of Educ.*, 195 Ariz. 235, ¶ 18, 986 P.2d 903, 908 (App. 1999).

¶6 To prove negligence, a plaintiff must show "(1) a duty requiring the defendant to conform to a certain standard of care; (2) a breach by the defendant of that

standard; (3) a causal connection between the defendant's conduct and the resulting injury; and (4) actual damages." *Gipson v. Kasey*, 214 Ariz. 141, ¶ 9, 150 P.3d 228, 230 (2007). "The question of duty is decided by the court" as a matter of law. *Markowitz v. Ariz. Parks Bd.*, 146 Ariz. 352, 356, 358, 706 P.2d 364, 368, 370 (1985). Whether a defendant breached a duty owed is generally a question of fact for the jury, but, when there is no dispute of material fact as to whether the defendant's conduct met the applicable standard of care, summary judgment is appropriate. *Booth v. Arizona*, 207 Ariz. 61, ¶ 10, 83 P.3d 61, 65 (App. 2004); *see also Coburn v. City of Tucson*, 143 Ariz. 50, 53, 691 P.2d 1078, 1081 (1984).

¶7 First, we address what, if any, duty the City owed to erect or maintain a right-turn-only sign at the location in question. *See Gipson*, 214 Ariz. 141, ¶ 11, 150 P.3d 228, 230-31 (2007) ("Whether the defendant owes the plaintiff a duty of care is a threshold issue; absent some duty, an action for negligence cannot be maintained."). The parties agree that a city has a duty to maintain its streets in a reasonably safe condition. *See Ariz. State Highway Dep't v. Bechtold*, 105 Ariz. 125, 129, 460 P.2d 179, 183 (1969) (city has "duty to maintain and repair [roads] in a manner which will keep them reasonably safe for ordinary travel"); *City of Phoenix v. Kenly*, 21 Ariz. App. 394, 395-96, 519 P.2d 1159, 1160-61 (1974) ("A municipality has been held to the duty to exercise reasonable care to see that its streets are safe for use by the traveling public."). But the parties disagree about whether this duty required the City to post and maintain the sign at issue.

¶8 The Maertenses maintain the City had a duty to install the sign as well as to repair and maintain it. But, as our supreme court has pointed out, we must avoid "confusion of the concept of 'duty' with that of 'negligence.'" *Beach v. City of Phoenix*, 136 Ariz. 601, 603, 667 P.2d 1316, 1319 (1983); *see also Coburn*, 143 Ariz. at 51-53, 691 P.2d at 1079-81. A city's duty to keep its streets and sidewalks reasonably safe for the public "remains constant, though the acts which are necessary to fulfill it vary depending upon the circumstances . . . ." *Beach*, 136 Ariz. at 603, 667 P.2d at 1319. Thus, assuming, as we must, that the sign here was located in the City's right-of-way,[3] *see Chalpin*, 220 Ariz. 413, ¶ 18, 207 P.3d at 671, the question whether the City should have maintained the sign in order to fulfill its duty to ensure its streets were reasonably safe is a question not of duty, but of breach of that duty. *See Coburn*, 143 Ariz. at 51-53, 691 P.2d at 1079-81.

¶9 "A breach of [a city's] duty [to maintain safe roadways] arises when a municipality knows—or, in the exercise of reasonable care, should know—that a street is unsafe and dangerous and then negligently fails to remedy the situation, or is negligent in the manner in which it attempts to remedy the situation." *Kenly*, 21 Ariz. App. at 396, 519 P.2d at 1161. And, "'[t]he city must have actual notice of a defect, or the defect must have existed a sufficient length of time to imply notice, before it is guilty of actionable

[3]The City argues that, because the sign was "part of . . . [a] driveway extending on to private property" and was located approximately fifty feet from where the accident occurred, it was not within the scope of its duty to maintain. As noted above, however, it also conceded for purposes of summary judgment that a factual dispute existed as to whether the sign was in the right-of-way.

negligence.'" *Lowman v. City of Mesa*, 125 Ariz. 590, 592, 611 P.2d 943, 945 (App. 1980), *quoting City of Phoenix v. Clem*, 28 Ariz. 315, 327, 237 P. 168, 172 (1925).

¶10 As the City points out, the Maertenses have not claimed the City had actual notice, nor have they presented any evidence about how long the sign was missing so as to imply constructive notice. *See Matts v. City of Phoenix*, 137 Ariz. 116, 119, 669 P.2d 94, 97 (App. 1983) ("In order to establish constructive notice, appellants were required to introduce some evidence that the defect complained of had existed for a sufficient length of time from which it could be inferred that, by the exercise of reasonable diligence, the city should have known of the defect."). At oral argument before this court, the Maertenses maintained that a photograph of the remainder of the sign, which had been included as an exhibit in their statement of facts, was evidence from which reasonable jurors could infer the sign had been down long enough to provide the city with constructive notice. We disagree. The Maertenses conceded they could not point to anything specific in the photograph to show how long the sign had been down. Jurors therefore could only speculate as to how long it had been missing. *See Matts*, 137 Ariz. at 120, 669 P.2d at 98 (photograph "standing alone" was insufficient evidence of constructive notice because "jury could only guess or speculate as to how long the defect had existed").

¶11 The Maertenses also contend, however, that they "did not need to prove notice to the City" because the City had itself caused the dangerous condition at issue and therefore notice was not required. *See Isbell v. Maricopa County*, 198 Ariz. 280, ¶ 12, 9 P.3d 311, 314 (2000) ("[A] plaintiff need not establish 'notice' if a government agency

itself creates or causes the dangerous condition."). Indeed, "[o]rdinarily, no notice is necessary to charge one with liability for one's own negligent conduct," and, "when there is sufficient evidence to go to the jury on the question of whether or not the city itself caused the defect, then notice is not necessary and liability may be predicated upon the negligent conduct itself." *Vegodsky v. City of Tucson*, 1 Ariz. App. 102, 109, 399 P.2d 723, 730 (1965).

¶12 Unlike the situation in *Vegodsky* and *Isbell*, however, the negligence alleged here was simply a failure to maintain a sign; there was no allegation that the City posted the sign in a defective manner or that it was responsible for the sign's demise. Rather, the Maertenses asserted below only that the sign "appear[ed] to have been hit or damaged." In *Vegodsky*, the City of Tucson had negligently repaired the area where the injury had occurred with a "type of material [that] could be expected to ravel in the manner that the subject intersection was raveled." 1 Ariz. App. at 108, 399 P.2d at 729. Similarly, in *Isbell*, Maricopa County had determined certain improvements to a railway crossing were necessary but then had failed to ensure they were ultimately installed. 198 Ariz. 280, ¶¶ 2-3, 9 P.3d at 312. It was the county's own negligence in failing to install the necessary improvements that formed the basis of the action.

¶13 The negligence alleged here, failing to maintain an existing sign, is more akin to those cases involving "a defective sidewalk condition," in which "notice is usually necessary because the cause of the defect is unknown and therefore there are many general statements of the law to the effect that there can be no liability unless there is notice." *Vegodsky*, 1 Ariz. App. at 109, 399 P.2d at 730. Likewise, "[w]here a city

improvement is not defective when made, but later becomes so, the rule is that the city must have actual notice of a defect, or the defect must have existed a sufficient length of time to imply notice, before it is guilty of actionable negligence." *Clem*, 28 Ariz. at 327, 237 P. at 172. Thus, in order to establish a prima facie case for negligence, the Maertenses were required to produce some evidence that the City had received notice the sign had been damaged or displaced. As discussed above, they failed to do so.[4]

¶14 Additionally, the Maertenses claim the City was negligent if it had never installed a right-turn-only sign at the driveway. In claiming alternatively that the City had been negligent in failing to install a sign, the Maertenses presented expert testimony that such a sign should have been posted "for the safety of the public." But the City's alleged failure to post a sign necessary to create a reasonably safe roadway would be an act of the City's own negligence, not that of a third party, and thus no notice of such negligence was required. *See Isbell*, 198 Ariz. at 283, 9 P.3d at 314. As the Maertenses insist on appeal, however, the City stipulated below for purposes of summary judgment that it had posted the existing sign.[5] Given that stipulation and the Maertenses'

[4]At the hearing on the City's motion for summary judgment, counsel for the City had stated: "For the purposes of the motion, we are willing to indicate[,] or stipulate that the City did put up the sign." At oral argument before this court, the Maertenses maintained they had not produced evidence of notice because they had been taken by surprise by this stipulation. But, the City also argued in its motion for summary judgment that if it had owned the driveway, notice was required. Thus, the Maertenses had an opportunity to address that issue in their response. And, in any event, they could have moved for more time pursuant to Rule 56(f), Ariz. R. Civ. P., and they failed to do so.

[5]Although the City stipulated "for purposes of summary judgment" it had posted the sign, it insisted in its brief on appeal that it has not changed its position that it "played

acceptance of it, there is no dispute that the City had installed a sign, thus defeating the Maertenses' claim that it had been negligent for not installing one.

¶15 In the absence of any probative evidence the City had notice of the damage to the existing sign, the trial court did not abuse its discretion in granting the City's motion for summary judgment.[6]

Disposition

¶16 The judgment of the trial court is affirmed.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Presiding Judge

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no role in the installation of the sign." The trial court apparently did not consider the stipulation dispositive on this issue.

[6]In granting the City's motion, the trial court ultimately concluded summary judgment was appropriate because the City "owed no duty to maintain a sign at the end of a private driveway that was not installed by it." Based on our reasoning above, this conclusion was incorrect and, as the Maertenses point out, ignored the City's stipulation. But the trial court also found that the Maertenses had "failed to present any evidence of notice," and, as noted above, "[w]e will affirm if the trial court's ruling is correct on any ground and if the facts produced in support of [the opposing party's] claims 'have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced.'" *MacLean*, 195 Ariz. 235, ¶ 18, 986 P.2d at 908, *quoting Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990).